84-87

NO. 84-

IN THE

SUPREME COURT OF THE UNITED STATES

KENNETH D. HANES,
Plantiff-Petitioner

V.

MARGARET HECKLER, SECRETARY,
DEPARTMENT OF HEALTH AND HUMAN SERVICES
Defendant-Respondent.

PETITION FOR LEAVE TO APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIURUIT No. 82-2812

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DEBORAH S. BENTON,
of Counsel

JOHN C. AMBROSE,
of Counsel

June 26, 1984

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DEBORAH S. BENTON,
of Counsel

June 26, 1984

ISSUE PRESENTED FOR REVIEW

WHETHER THE SECRETARY'S DECISION, THAT PLAINTIFF-PETITIONER IS NOT DISABLED AS DEFINED BY THE SOCIAL SECURITY ACT, IS CONSISTENT WITH THE DECISIONS OF OTHER COURTS IN THIS CIRCUIT AND OTHER CIRCUITS.

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JURISDICTIONAL STATEMENT

Jurisdiction for this appeal is invoked pursuant to Title 28 U.S.C. Section 2101. Summary judgment was entered in favor of Defendant on October 21, 1982. On appeal to the United States Court of Appeals for the Seventh Circuit, the court affirmed, on January 19, 1984. A Petition for Rehearing was filed, and subsequently denied by that court on February 28, 1984.

APPLICABLE LAW

The applicables statutes are 42 U.S.C. Sections 416(i) and 423. They are too lengthy to be reporter here, and pursuant to Supreme Court Rule 21(f) are thus included in the Appendix attached.

STATEMENT OF THE CASE

Plaintiff-Petitioner Kenneth D. Hanes filed an action in the United States District Court for the Northern District of Illinois, Eastern Division, seeking judicial review of the final decision of Defendant, Secretary of Health and Human Services, denying Plaintiff's application for disability insurance benefits, as provided for under Sections 216(i) and 223 of the Social Security Act. 42 U.S.C. Sections 416(i) and 423. Plaintiff's application was filed on May 14, 1980, and denied by the Social Security Administration. (Tr. p. 68-73). Subsequently, a hearing was held before an Administrative Law Judge ("ALJ"), who decided, on June 5, 1981, that Plaintiff was not under a disability. (Tr. p. 16). This decision became final on August 12, 1981, when approved by the Appeals Council. (Tr. p. 3). In the District Court, Defendant's motion for summary judgment was allowed on October 21, 1982. Plaintiff's basis for Federal jurisdiction was based on the provisions of 42 U.S.C. Section 405(g).

The following evidence was elicited at the hearing before the ALJ. Kenneth Hanes, a 34-year old former sheet metal worker, with a high-school education, testified that he injured his back in May of 1979 while unloading some steel siding at his job. As a result of his injury--a fracture at L2--he was hospitalized four times and has been unable to return to his work. (Tr. p. 105-140). Up until that time, he had an excellent work record, except for six months following a work injury when he broke his neck. Since his back injury in May, he has been forced to severely restrict his activities. Due to an incessant pain in his back, he is precluded from bending, stooping, climbing or lifting. In addition, he is

occasionally confined to bed for three or four days at a time. (Tr. p. 41-47). He sometimes wears a back brace, and frequently must rest his back for at least 45 minutes. His treating physician, an orthopedic surgeon, found him unable to work at all, based on objective medical findings. The ALJ concluded that Plaintiff could not return to his former employment, but could engage in sedentary work, thereby denying him disability benefits.

ARGUMENT

Kenneth D. Hanes appealed to the United States Court of Appeals for the Seventh Circuit following entry of summary judgment against him in an action brought pursuant to 42 U.S.C. section 405(g) for review of a decision of the Secretary denying his claim for Social Security disability benefits. On appeal, Hanes contended that the Secretary's decision was not supported by substantial evidence and that in determining his disability status the Secretary improperly applied the law regarding subjective pain and use of objective medical evidence.

Plaintiff-Petitioner Kenneth Hanes respectfully submits that review of the decision of the United States Court of Appeals' decision, affirming the District Court decision, is warranted by the Supreme Court, based on the inconsistent conclusions of the Seventh Circuit Court, compared with similarily situated claimants before other courts. The court's decision in this case is patently in conflict with the decisions of similar cases in this and other circuits.

In this case, once it was established that Hanes could not continue his past employment as a sheet metal worker, the burden shifted to the Secretary to prove with substantial evidence that he could still engage in other kinds of work available in the national economy. In meeting that burden, the Secretary must make two determinations. "She must assess each claimant's individual abilities and then determine whether jobs exist that a person having the claimant's qualifications could perform. The first inquiry involves a determination of historic facts, and the regulations properly require the Secretary to make these findings on the basis of evidence adduced at a hearing."

Heckler v. Campbell, 103 S.Ct. 1952, 1957 (1983).

Plaintiff-Petitioner submits that the medical evidence presented at his hearing before the ALJ, and his complaints of pain, do not support the Secretary's determination that Plaintiff failed to establish a disability sufficient to entitle him to benefits. The ALJ specifically found that "claimant's allegation of constant pain so severe as to be disabling" was less than credible. In addition, the ALJ concluded that claimant could perform sedentary level work, and that this was not significantly limited by his alleged pain and discomfort.

In its opinion, page 5, the District Court properly recognized that Plaintiff's complaints of pain, if believed, would support a finding of disability. Stark v. Weinberger, 497 F.2d 1092 (7 Cir. 1974); Marcus v. Califano, 615 F.2d 23 (2 Cir. 1979). However, the court then asserted that the ALJ found Hanes' allegations of pain "less than credible" and thus the court would not disturb that assessment by the ALJ. This reasoning by the court is in direct conflict with similar cases in this and other circuits and demands review.

For instance, in the recent case of Szulyk v. Heckler, No. 83 C 2810 (U.S.Dist. Ct., N.D. Ill. 1984), claimant's former employment was in a bench assembly position. However, Plaintiff alleged that pain in her neck, shoulder, and back prevented her from engaging in any substantial gainful activity. The ALJ determined that her complaints of pain were simply "not entirely credible." In its opinion, the District Court stated that such a conclusion was not supported by the evidence. "From the decision of the ALJ, one might conclude that reports of pain are

rarely found in the record. However, upon close examination, it is clear that complaints and extensive treatment of pain make up a substantial portion of Plaintiff's medical history." (p. 5). The court went on to conclude, "While the ALJ's observations of Plaintiff are certainly relevant and reliable, in light of the overwhelming evidence to the contrary contained in the record, to simply declare that Plaintiff's complaints of pain were "not entirely credible", without further explanation, constitutes error on the part of the ALJ." (p. 6).

In this case, Hanes' complaints of pain are amply supported by the evidence elicited at his hearing and contained in the record. Both the ALJ and the District Court noted, but then proceeded to ignore, Plaintiff's testimony regarding his daily activities. (Op., p. 2-3, Admin. record at 10). If one assumes that the ALJ disbelieved Hanes' testimony, then this might lead to the anomalous conclusion that the more Plaintiff is suffering, the harder it would be for him to establish the believability of his claim. Moreover, the ALJ failed to explain what he relied on in dismissing Plaintiff's complaints as not credible. He completely disregarded the treating physicians' clinical findings of pain and the fracture at L2, which existed in 1979 and 1980. It appears that he evaluated Hanes' credibility solely on the basis of his personal observations at the hearing. Clearly, the ability to sit one-and-a-half hours through a hearing, with occasional repositioning, is not substantial evidence justifying the ALJ's findings on pain. The court below overlooked the basic premise that credibility determinations by the ALJ are not binding, and in this instance are unsupported by the evidence as a whole.

It is well established in various circuits that it is impermissible for an ALJ to make a determination of disability on the basis of a "sit and squirm" index, based on the ALJ's personal observations of the claimant at the hearing. Tyler v. Weinberger, 409 F.Supp. 776 (E.D. Va. 1976); Van Huss v. Heckler, 572 F.Supp. 160 (W.D.Va. 1983); Lee v. Heckler, 568 F.Supp. 456 (N.D.Ind. 1983); Steffanick v. Heckler, 570 F.Supp. 420 (D.Md. 1983). Since Hanes' pain had a specific physical cause--a fracture at L2--and this was corroborated by all his physicians and X-rays, as conceded by the court in its opinion, page 3, then the Secretary should have considered the effect of pain on Hanes' ability to function, instead of flatly rejecting it. Where the Secretary's findings on pain are supported only by the ALJ's observations and personal opinions, this is not substantial evidence sufficient to deny claimant benefits. Van Huss, 572 F.Supp. at 167.

In Steffanick v. Heckler, supra, plaintiff appealed from the Secretary's decision denying him disability benefits. At the administrative hearing, he testified that he had continuous pains in his neck, back and arm which prevented him from working. Like Hanes, the plaintiff frequently needed to rest between periods of standing or sitting, and could only walk a short distance. Nevertheless, the ALJ in Steffanick similarily concluded that Plaintiff was capable of sedentary work activity, finding his allegations of pain incredible because of the medical evidence and plaintiff's appearance at the hearing. 570 F.Supp. at 426.

Reviewing the record, the Steffanick court acknowledged that an ALJ properly evaluates a claimant's subjective complaints and weighs

his credibility. 570 F.Supp. at 426. However, "an ALJ's observation that a claimant did not appear to be in pain while testifying is entitled to 'little or no weight, and standing alone, cannot be substantial evidence in support of the Secretary's decision.'" 570 F.Supp. at 426; Lewis v. Weinberger, 541 F.2d 417, 421 (2 Cir. 1976). The court, therefore, concluded that the ALJ erred since there was direct medical evidence consistent with plaintiff's subjective complaints.

Similarily, all of Hanes' physicians noted back impairments of a significant nature. These impairments substantiated the existence of subjective pain. Furthermore, Hanes had an excellent work record up until his injury in 1979. According to the court in Steffanick, "When, as here, a claimant has a substantial work record, his testimony as to pain should not be disregarded lightly." 570 F.Supp. at 427. "A claimant with a good work record is entitled to substantial credibility when claiming an inability to work because of a disability." Rivera v. Schweiker, 717 F.2d 719 (2 Cir. 1983).

In Rivera, the ALJ determined that plaintiff suffered no severe or disabling pain, and found his complaints not credible. The court asserted, "[A]lthough it is clearly permissible for an administrative law judge to evaluate the credibility of an individual's allegations of pain, this individual judgment should be arrived at in light of all the evidence regarding the extent of pain...It is clear to us that the ALJ herein did not follow the standard. In assessing Rivera's allegations of pain, the ALJ placed principal, if not sole, reliance upon his observations at the hearing. The ALJ's observations, under these circumstances, are entitled to limited

weight." 717 F.2d at 724.

In the same respect, the ALJ made a blanket statement that Hanes' complaints were less than credible, and this conclusion appeared to result solely from his observation of Hanes at the hearing. The record in this case does not indicate that pain was properly weighed; the ALJ clearly ignored the rule that a claimant's subjective evidence of pain, when accompanied by objective medical evidence, as exists here, is entitled to great weight. Dobrowolsky v. Califano, 606 F.2d 403, 409 (3 Cir. 1979). Upon examining the court's opinion on pain in this case, page 6, it is evident that the court erroneously concluded that the ALJ's credibility determination was binding, despite the fact it was made without any basis in the record, and apparently based on his observations alone--a "sit and squirm" index.

In Coleman v. Heckler, 572 F.Supp. 1089 (D.C.Colo. 1983), the ALJ similarily determined that claimant's allegations of pain were less than fully credible. That court stated, "While the credibility of a claimant's subjective allegations of pain is to be resolved by the ALJ, there must be some factual basis in the record supporting the ALJ's finding. The ALJ offered no explanation for his disbelief of the plaintiff's sworn testimony. 42 U.S.C. 405 (b) has been interpreted as requiring the Secretary to make 'full and detailed findings in support of all his conclusions.'" 572 F.Supp. at 1091. In this case, the ALJ failed to provide a basis for his finding that Hanes was not credible, and the court below should have followed the reasoning in Coleman, as well as the statute, and denied Defendant Secretary's motion for summary judgment.

Plaintiff-Petitioner respectfully submits that review of this case is warranted based on the inconsistent conclusion reached by the Seventh Circuit courts in comparison with those of other circuits regarding subjective pain. In addition, Petitioner contends that the court's decision regarding substantial evidence is misplaced and contradicts the rules set forth in other circuits.

It is well settled that the decision of the Secretary must be supported by substantial evidence. 42 U.S.C. 405(g). Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971). It must be noted that the intent of the Social Security Act is inclusion, rather than exclusion, so that the Act should be liberally applied. Rivera, 717 F.2d at 723.

The Fourth Circuit has asserted that "even if legitimate reasons exist for rejecting or discounting certain evidence, the Secretary cannot do so for no reason or for the wrong reason." King v. Califano, 615 F.2d 1018, 1020 (4 Cir. 1980). In this case, the ALJ disregarded the findings of Dr. Farah and Dr. Groves, Hanes' treating physicians, despite the fact that their opinions were supported by clinical findings and other evidence, as required under 20 C.F.R. section 404.1526. In its opinion, the District Court stated that the ALJ had given less weight to the reports of two doctors who had examined Hanes only once. Furthermore, the Court asserted that the doctors' opinions differed radically as to Hanes' ability to work. Yet, all of the doctors did agree on the existence of a back impairment, even if their conclusions on the ultimate question for the Secretary differed.

It is well established that the opinion of a treating physician is entitled to special consideration and is not to be disregarded lightly in the absence of competent conflicting evidence. Steffanick, 570 F.Supp. at 425. It appears the ALJ and the Court placed undue emphasis on the difference in two work assessments rendered by the same treating physician within a six-month period. "The expert opinion of a treating physician on the subject of disability is binding on the Secretary unless substantial evidence is presented to the contrary." Rivera, 717 F.2d at 723. One of Hanes' treating physicians--an orthopedic surgeon--concluded that Hanes was totally incapable of working. Another doctor also reached this same conclusion. There wasn't any other substantial evidence presented to the contrary, apart from a report by a doctor based on a single examination of Hanes. This cannot be said to be the "substantial evidence" contemplated by the court in Steffanick and Rivera. In sum, the medical evidence does not provide "substantial evidence" contradictory to the treating physician's conlclusion of disability. There is clearly a significant circuit conflict on this point, since the Seventh Circuit took the position here that the ALJ could reject the opinion of Hanes' treating physician and substitute his own opinion, or that of a physician who examined Hanes once.

CONCLUSION

WHEREFORE, Plaintiff-Petitioner, **KENNETH D. HANES**, respectfully submits that a review of the decision by the United States Court of Appeals for the Seventh Circuit is warranted by this court, and prays that his Petition for Leave to Appeal be granted.

Respectfully submitted,

_____

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APPENDIX

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KENNETH HANES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 81 C 5686
RICHARD S. SCHWEIKER, Secretary of Health and Human Services,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

This cause is before the court on defendant's motion for summary judgment. For the reasons hereinafter stated, the defendant's motion will be granted and the cause dismissed.

The plaintiff Kenneth D. Hanes filed this action to obtain judicial review of the final decision of the defendant Secretary of Health and Human Services denying plaintiff's application for disability insurance benefits as provided by Sections 216(i) and 223 of the Social Security Act. 42 U.S.C. 416(i), 423 (1976).

Plaintiff's application was filed on May 14, 1980, alleging that he became unable to work May 25, 1979, at age 32, following a back injury. His application was initially denied, and on reconsideration, the Office of Disapility Operations of the Social Security Administration found that he was not disabled. Subsequently, a hearing was held before an administrative law judge (ALJ), who decided, on June 5, 1981, that plaintiff was not under a disability. The ALJ's decision

became final when the Appeals Council approved that decision on August 12, 1981.

Under the Social Security Act, review of the Secretary's decision is limited in scope to evidence within the administrative record, and the Secretary's findings must be upheld if supported by substantial evidence. 42.U.S.C. 405(g). The record includes the transcript of the hearing before the ALJ as well as the documentary evidence (including medical records) which was considered in the ALJ's decision. The evidence will be summarized briefly here.

THE EVIDENCE

At the hearing before the ALJ, Mr. Hanes, a 34-year old former sheet metal worker testified that his back was injured as he was unloading some steel siding. He was hospitalized four times as a result of this injury, and testified that his subsequent activities have been severely limited. A fair summary of his testimony appears in the ALJ's decision:

> He testified that he was unable to sit for long; he could not bend, stoop or climb; he had constant pain in his lower back and down his right leg; he had a bad attack of back pain at least once a week, and sometimes could not get out of bed. He said that he did no lifting, and could not bend because it strained his back. He wore a back brace, but only three or four days during a month. He could move around for about an hour but after that he had to lay down and rest his back for at least 45 minutes. He had estimated he could walk only about one block. The pain in his back and leg were constant and that was why he could not sit for long without having to get up and change

position.

Administrative Record at 10.

Also in the record were reports from several doctors who had examined Mr. Hanes including his treating physicians, a company doctor who had examined him in connection with a worker's compensation claim, and a doctor who examined him in preparation for his hearing. The various doctor's reports were fairly consistent in describing plaintiff's physical condition, but there was considerable variation in their assessments of his physical capacity. The "Physical Capacities Evaluation" is an agency form on which physicians are asked to estimate the applicant's work capabilities "based on objective findings only, not on the applicant's opinions or subjective complaints." Three evaluations in the month of June found Mr. Hanes objectively capable of handling sedentary, lignt, and medium level work, respectively. Mr. Hanes' orthopedic surgeon, who had found him capable of medium level work in June, found him completely unable to work in October. However, the surgeon's description of Mr. Hanes' condition showed no essential change from the earlier examination.

The ALJ also considered the hearing testimony of a vocational expert as to the availability of employment for a man with Mr. Hanes' skills based on various hypothetical exertional capabilities. The expert was first asked to assume that Mr. Hanes was capable of doing sedentary work, but could not bend, climb, stoop, or use foot controls, and he estimated that there were around 2000 jobs in the Chicago area that Mr. Hanes could do. To a second hypothetical, in which it was posited that Mr. Hanes would have to stand for 15 minutes after sitting for an

hour, the expert estimated that this would eliminate about half the jobs, leaving approximately one thousand possible jobs.

After considering the evidence, the ALJ issued a number of findings. Those relevant to this opinion are:

3. Based on the hearing appearance and the objective medical evidence of record the claimant's allegation of constant pain so severs as to be disabling is less than credible.

4. The clamant has the residual functional capacity to perform sedentary substantial gainful activity, but cannot climb, bend, stoop or operate foot controls.

5. The claimant is unable to perform his past relevant work as a sheet metal worker.

6. Considering the exertional and non-exertional impairments, the claimant has the residual functional capacity to perform substantial sedentary gainful activity.

7. The level of work the claimant can perform is not significantly limited by the pain and discomfort he alleges.

Administrative Record at 15.

DISCUSSION

Under the Social Security Act, a person is "disabled" if he is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in

death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. 423(d)(1)(A). The ALJ found that plaintiff was not under a disability. Defendants correctly maintain that the decision must be upheld if supported by substantial evidence in the record as a whole. Plaintiff claims that the ALJ failed to consider his subjective pain in determining that he was capable of performing sedentary work. He specifically complains that his pain was not mentioned as a factor in the hypothetical questions posed to the vocation expert by the ALJ.

SUBJECTIVE PAIN

Subjective pain may serve as a basis for establishing disability, even if unaccompanied by positive clinical findings or other objective evidence. Marcus v. Califano, 615 F.2d 23 (2d Cir. 1979), Stark v. Weinberger, 497 F.2d 1092 (7th Cir. 1974). Plantiff's testimony as to his pain was fully developed at the hearing and that testimony, if believed, would support a finding of disability. See Marcus v. Califano, supra. If the ALJ had refused to consider the issue of pain as relevant to a disabiltiy determination, the court would clearly be required to remand this matter for a further factual determination as to the existence of pain, and its effect if any on plaintiff's ability to engage in substantial gainful activity. See, e.g., Garcia v. Califano, 463 F.Supp. 1098 (N.D. Ill. 1979). However, the ALJ here considered the plaintiff's allegation of disabling pain and found the "less than credible."

Credibility decisions are properly made by the ALJ who had the opportunity to observe and question the witness, and not by a reviewing court faced with a bare written

record. Marcus v. Califano, supra, Moon v. Celebrezze, 340 F.2d 926 (7th Cir. 1965). The ALJ specifically rejected plaintiff's claim of disabling pain and this court has no basis for a differing assessment. Having found plaintiff's assertions of pain not credible, the ALJ was plainly not required to pose severe pain as a factor in framing hypothetical questions for the vocational expert.

SUBSTANTIAL EVIDENCE

The remaining question is whether the ALJ's findings that the plaintiff was not disabled, and that he was capable of substantial gainful activity at a sedentary level were supported by substantial evidence in the record. These findings are conclusive if they are not supported by such relevant evidence as a resonable mind might accept as adequate to support the conclusion Richardson v. Perales, 402 U.S. 389, 401 (1971); McNeil v. Califano, 614 F.2d 142, 145 (7th Cir. 1980); Allen v. Weinberger, 552 F.2d 781, 784 (7th Cir. 1977),

The ALJ's decision was apparently based on the objective medical evidence and on the several Physical Capacities Evaluations in the record. Less weight was given to the reports of the two doctors whose opinions were based on a single examination. The doctors' opinions as to plaintiff's physical capacity differed radically based on the same objective evidence. As noted above, three examinations in the same month resulted in very different physical capacities evaluations. Only two doctors found Mr. Hanes incapable of working, however. One of these had examined him only once in preparation for his disability hearing, and this report was given less weight by the ALJ. The other was plaintiff;s orthopedic surgeon,

and as the ALJ noted, this assessment differed markedly form an assessment made 6 months earlier by the same physicain with no intervening change in plaintiff's physical condition to explain the different opinion. The medical evidence offers substantial support for the ALJ's finding that plaintiff was capable of sedentary work.

Finally, the vocational expert testified that substantial employment was available in the area to one of the plaintiff's skills and capabiltities. The testimony was uncontroverted, and plaintiff's attorney did not object to the expert's qualifications.

CONCLUSION

A careful review of the administrative record shows that the findings of the ALJ and the Secretary are supported by substantial evidence. Accordingly, the decision of the Secretary must be, and is affirmed.

SENIOR JUDGE

October 21, 1982.

Unpublished Per Curiam Order
JUDGMENT - WITHOUT ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

10

Chicago, Illinois 60604

January 19, 1984

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge

KENNETH D. HANES	) Appeal from the United
	) States District Court
Plaintiff-Appellant,	) for the Northern
	) District of Illinois,
No. 82-2812 vs.	) Eastern Division.
	) No. 81 C 5686
RICHARD SCHWEIKER,	) Judge Edwin Robson
Secretary of Health	)
and Human Services,	)
Defandant-Appellee.	)

This cause came before the Court for decision on the record from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of said District Court in this cause appealed brom be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this Court entered this date.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604
(SUBMITTED NOVEMBER 1, 1983)*

January 19, 1984.

Before
Hon. WALTER J. CUMMINGS, Chief Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge

KENNETH D. HANES Plaintiff-Appellant, No. 82-2812 vs. RICHARD SCHWEIKER, Secretary of Health and Human Services, Defandant-Appellee.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 81 C 5686 Edwin Robson, Judge.

ORDER

Plaintiff-Appellant Kenneth Hanes challenges the decision of the Secretary of Health and Human Services that he is not disabled. We have reviewed the record and carefully considered the briefs of counsel. We concur in the analysis of the district court and adopt its opinion (attached as an appendix) as the order of this court.

AFFIRMED

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*After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this

case. The notice provided that any party might file a "Statement as to Need of Oral Argument." See Rule 34(a), Fed. R. App. P.; Circuit Rule 14(f). No such statement having been filed, the appeal has been submitted on the briefs and record.

APPEAL TO THE U.S. COURTS OF APPEALS
FOR THE SEVENTH CIRCUIT

FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KENNETH HANES,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	NO. 81 C 5686
	)	
RICHARD SCHWEIKER, Secretary of Health and Human Services	)	The Honorable Edwin Robson, Judge Presiding.
	)	
Defendant-Appellee.	)	

NOTICE OF FILING NOTICE OF APPEAL

TO: Mr. Michael S. O'Connell
Asst. U.S. Attorney
219 South Dearborn Street
Chicago, Illinois 60603

NOTICE IS HEREBY SENT to you this 8th day of November, 1982, that I filed a Notice of Appeal on November 8th, 1982, copy attached, on behalf of Plaintiff-Appellant in this case no. 81 C 5686.

AMBROSE & CUSHING, P.C.

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

I, JOHN C. AMBROSE, being first duly sworn on oath, deposes and says that a copy of the attached Notice of Appeal and Notice of

Filing Notice of Appeal was served upon Michael S. O'Connell by mailing a copy of same to him at the above listed address this 8th day of November, 1982.

AMBROSE & CUSHING, P.C.
Attorneys for Plaintiff
7 South Dearborn Street
Chicago, Illinois 60603
726-1470

JOHN C. AMBROSE

APPEAL TO THE U.S. COURTS OF APPEALS
FOR THE SEVENTH CIRCUIT

FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KENNETH HANES,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	NO. 81 C 5686
	)	
RICHARD SCHWEIKER,	)	The Honorable
Secretary of Health	)	Edwin Robson,
and Human Services	)	Judge Presiding.
	)	
Defendant-Appellee.	)	

NOTICE OF APPEAL

The Plaintiff-Appellant, KENNETH HANES, by his Attorneys, AMBROSE & CUSHING, P.C., appeals to the U.S. Courts of Appeals For the Seventh Circuit from the Memorandum Opinion and Order granting Defendant, RICHARD SCHWEIKER, Secretary of Health and Human Services Motion for Summary Judgment entered on October 21, 1982.

By: John C. Ambrose
AMBROSE & CUSHING, P.C.

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UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

February 28, 1984.

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge

KENNETH D. HANES	) Appeal from the United
	) States District Court
Plaintiff-Appellant,	) for the Northern
	) District of Illinois,
No. 82-2812 vs.	) Eastern Division.
	) No. 81 C 5686
RICHARD SCHWEIKER,	) Judge Edwin Robson
Secretary of Health	)
and Human Services,	)
Defandant-Appellee.	)

On consideration of the petition for rehearing filed in the above-entitled cause by Kenneth Hanes, plantiff-appellant, all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the sa…e is hereby, DENIED.

(i) Disability--Period of disability. Except for purposes of sections 202(d), 202(e), 202(f), 223, and 225 (42 USCS Section 402(d), (e), (f), 423, 425), the term "disability" means (A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than 12 months, or (B) blindness; and the term "blindness" means central visual acuity of 20/200 or less in the better eye with the use of a correcting lens. An eye which is accompanied by a limitation in the fields of vision such that the widest diameter of the visual field subtends an angle no greater than 20 degrees shall be considered for purposes of this paragraph as having a central visual acuity of 20/200 or less. The provisions of paragraphs (2)(A), (3), (4), and (5) of section 223(d) (42 USCS section 423(d)(2)(A), (3)-(5)) shall be applied for purposes of determining whether an individual is under a disability within the meaning of the first sentence of this paragraph in the same manner as they are applied for purposes of paragraph (1) of such section. Nothing in this title shall be construed as authorizing the Secretary or any other officer or employee of the United States to interfere in any way with the practice of medicine or with relationships between practitioners of medicine and their patients, or to exercise any supervision or control over the administration or operation of any hospital.

(2)(A) The term "period of Disability" means a continuous period (beginning and ending as hereinafter provided in the subsection) during which an individual was under a disability (as definded in paragraph (1)), but only if such period

is of not less than five full calendar months' duration or such individual was entitled to benefits under section 223 (42 USCS section 423) for one or more months in such period.

(B) No period of disability shall begin as to any individual unless such individual files an application for disability determination with respect to such period; and no such period shall begin as to any individual after such individual attains the age of 65. In the case of a deceased individual, the requirement of an application under the preceding sentence may be satisfied by an application for a disability determination filed with respect to such individual within 3 months after the period in which he died.

(C) A period of disability shall begin--

(i) on the day the disability began, but only if the individual satisfies the requirements of paragraph(3) on such day; or

(ii) if such individual does not satisfy the requirements of paragraph (3)on such day, then on the first day of the first quarter thereafter in which he satisfies such requirements.

423. DISABILITY INSURANCE BENEFIT PAYMENTS

(a) Disability insurance benefits.

(1) Every individual who--

(A) is insured for disability insurance benefits (as determined under subsection (c)(1)),

(B) has not attained the age of sixty-five,

(C) has filed application for disability insurance benefits, and

(D) is under a disability (as defined in subsection (d)),

shall be entitled to a disability insurance benefit (i) for each month beginning with the first month after his waiting period (as defined in subsection (c)(2)) in which he becomes so entitled to such insurance benefits, or (ii) for each month beginning with the first month during all of which he is under a disability and in which he becomes so entitled to such insurance benefits, but only if he was entitled to disability insurance benefits which terminated, or had a period of disability (as defined in section 216(i) (42 USCS Section 416(i))) which ceased, within the 60-month period preceding the first month in which he is under such disability, and ending with the month preceding whichever of the following months is the earliest: the month in which he dies, the month in which he attains age 65, or the third month following the month in which his disability ceases. No payment under this paragraph may be made to an individual who would not meet the definition of disability in subsection (d) except for paragraph (1)(B) thereof for any month in which he engages in substantial gainful activity, and no payment may be made for such month under subsection (b), (c), or (d) of section 202 (42 USCS Section 402(b), (c), or (d)) to any person on the basis of the wages and self-employment

income of such individual. In the case of a deceased individual, the requirement of subparagraph (C) may be satisfied by an application for benefits filed with respect to such individual within 3 months after the month in which he died.

(d) Definition of disability.

(1) The term "disability" means--

(A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months; or

(B) in the case of an individual who has attained the age of 55 and is blind (within the meaning of "blindness" as defined in section 216(i)(1) (42 USCS Section 416(i)(1))), inability by reason of such blindness to engage in substantial gainful activity requiring skills or abilities comparable to those of any gainful activity in which he has previously engaged with some regularity and over a substantial period of time.

(2) For purposes of paragraph (1)(A)--

(A) an individual (except a widow, surving divorced wife, or widower for purposes of section 202(e) or (f) (42 USCS Section 402(e) or (f))) shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would

be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

(B) A widow, surving divorced wife, or widower shall not be determined to be under a disability (for purposes od awxrion 202(e) or (f) ((42 USCS Section 402(e) or (f))) unless his or her physical or mental impairment or impairments are of a level of severity which under regulations prescribed by the Secretary is deemed to be sufficient to preclude an individual from engaging in any gainful activity.

(3) For purposes of this subsection, a "physical or mental impairment" is an impairment that results from anatomical, physiological, or spychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.

(4) The secretary shall by regulation prescribe the criteria for determining when services performed or earnings derived from services demonstrate an individuals' ability to engage in substantial gainful activity. Notwithstanding the provisions of paragraph (2), an individual whose services or earnings meet such criteria shall, except for purposes of section 222(c) (42 USCS Section 222(c)), be found not to be disabled.

(5) An individual shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Secretary may require.

NO. 84-

IN THE

SUPREME COURT OF THE UNITED STATES

KENNETH D. HANES,
Plantiff-Petitioner

V.

MARGARET HECKLER, SECRETARY,
DEPARTMENT OF HEALTH AND HUMAN SERVICES
Defendant-Respondent.

NOTICE OF FILING

TO: Mr. Michael S. O'Connell
Assistant U.S. Attorney
219 South Dearborn Street
Chicago, Illinois 60603

TO: Office of the Solicitor General
U.S. Department of stice
Main Justice Building
Washington, D.C. 20530

PLEASE TAKE NOTICE that on the 25th day of May, 1984, I filed with the Clerk of the United States Supreme court for presentation to the Judges the Petition for Writ of Certiorari on behalf of Plaintiff-Petitioner, KENNETH HANES.

JOHN C. AMBROSE

AMBROSE & CUSHING, P.C.
Attorneys for Plaintiff
7 South Dearborn Street
Chicago, Illinois 60603
(312)726-1470

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

AFFIDAVIT OF MAILING

I, JOHN C. AMBROSE, after first being duly sworn upon oath depose and say:

1. That I am the Attorney of Record for the Plaintiff-Petitioner, KENNETH HANES in the Petition for Writ of Certiorari;

2. That pursuant to the Rules of Practice of the Supreme Court of the United States, I certify the forty-five (45) copies of the Petition for Writ of Certiorari and Appendix were mailed to the Clerk of the United States Supreme Court on May 25, 1984 to be filed as of May 25, 1984;

3. That pursuant to the Rules of Practice of the Supreme Court of the United States, I certify that three (3) copies of the Petition for Writ of Certiorari and Appendix were mailed to:

(a) Mr. Michael S. O'Connell
Assistant U.S. Attorney
219 South Dearborn Street
Chicago, Illinois 60603

(b) Office of the Solicitor General
U.S. Department of Justice
Main Justice Building
Washington, D.C. 20530

on May 25, 1984 by placing the same in an envelope with the above-mentioned names and addresses and depositiong said envelopes in the U.S. Mail in Chicago, Illinois on May 25, 1984.

_____
JOHN C. AMBROSE

SUBSCRIBED and Sworn to before me this 25th day of May, 1984.

_____
NOTARY PUBLIC

No. 84-87 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1984

KENNETH D. HANES, PETITIONER

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

10 pp

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-87

KENNETH D. HANES, PETITIONER

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that the courts below erred in upholding the decision of the Secretary of Health and Human Services denying his application for disability insurance benefits under Sections 216(i) and 223 of the Social Security Act, 42 U.S.C. 416(i) and 423.

1. Petitioner, a former sheet metal worker, filed an application for disability insurance benefits on May 14, 1980, alleging disability, beginning in May 1979, resulting from a back injury. The application was denied at the initial determination stage and upon reconsideration. Thereafter a hearing was held before an administrative law judge (ALJ). Pet. App. 17.

In a decision dated June 5, 1981, the ALJ concluded that petitioner was not disabled (Pet. App. 17). The evidence showed that petitioner had fallen from a roof and severely injured himself in 1969, but was able to return to work until

May 1979, when he injured his back lifting a piece of steel at work (ALJ Decision 4).[1] Although the ALJ observed that petitioner did have some exertional and non-exertional impairments resulting from his back injury,[2] he found that those impairments would not prevent petitioner from performing "sedentary substantial gainful activity" that did not involve climbing, bending, stooping or operating foot controls (ALJ Decision 9). This determination was based in part on the testimony of a vocational expert, who identified specific jobs petitioner could perform, such as inspection and quality control, and estimated that there were 1000 jobs in the Chicago area that petitioner could perform even in light of limitations on his physical activities (*id.* at 7-8). Based on the objective medical evidence in the record and petitioner's appearance at the hearing, the ALJ found that petitioner's assertion that he had constant back pain so severe as to be disabling was "less than credible" (*id.* at 9). The ALJ further found that the level of work petitioner could perform was not "significantly limited" by his alleged pain and discomfort (*ibid.*). The ALJ's decision became the final decision of the Secretary when the Appeals Council approved it on August 12, 1981 (Pet. App. 17-18).

Petitioner then sought judicial review in the United States District Court for the Northern District of Illinois. In an unpublished memorandum and order, the district court held that the Secretary's findings were supported by substantial evidence and granted the Secretary's motion for summary judgment (Pet. App. 17-23). The district court

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[1]We have lodged a copy of the ALJ's decision with the Clerk of the Court.

[2]The ALJ found that petitioner's physical impairments included "post healed compression fracture of L2 [lumbosacral spine], moderate to severe lumbosacral sprain, osteoarthritis, radiculitis on the right side, and accompanying discomfort" (ALJ Decision 9).

rejected petitioner's contention that the ALJ had failed to consider his subjective assertions of pain. The court agreed with petitioner that pain may serve as a basis for establishing disability even if unaccompanied by positive clinical findings or other objective medical evidence (Pet. App. 21, citing *Marcus* v. *Califano*, 615 F.2d 23 (2d Cir. 1979), and *Stark* v. *Weinberger*, 497 F.2d 1092 (7th Cir. 1974)), but it noted that petitioner's testimony regarding the pain he experienced in fact had been fully developed at the hearing (Pet. App. 21). The court found no reason to disturb the ALJ's assessment of that evidence and his resulting conclusion that petitioner's pain was not disabling. The court explained that credibility decisions are "properly made by the ALJ who had the opportunity to observe and question the witness, and not by a reviewing court faced with a bare written record" (*id.* at 21-22).

The court of appeals affirmed on the basis of the district court's opinion (Pet. App. 25).

2. The decision of the district court, adopted by the court of appeals, is clearly correct and does not conflict with any decision of this Court or any other court of appeals. Further review of petitioner's fact-bound submission is not warranted.

a. Petitioner contends (Pet. 7-8) that the district court erred in evaluating his subjective complaints of pain. However, the district court actually applied a legal standard that is quite favorable to the claimant, stating that "[s]ubjective pain may serve as the basis for establishing disability, even if unaccompanied by positive clinical findings or other objective evidence" (Pet. App. 21, citing *Marcus* v. *Califano*, 615 F.2d at 27). Petitioner cites no case establishing a standard that is more favorable to disability claimants (compare, *e.g.*, *Polaski* v. *Heckler*, 739 F.2d 1320 (8th Cir. 1984)), and indeed petitioner does not even challenge the standard applied by the courts below (see Pet. 8).

That legal issue is of no continuing importance in any event, because Congress recently prescribed statutory standards for evaluating pain in disability cases when it enacted the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 *et seq.* Those standards, set forth in Section 3(a)(1) of the 1984 Act, are more stringent than the standard applied in this case. Section 3(a)(1) provides that an individual's statement of pain is not alone conclusive evidence of disability; that "[o]bjective medical evidence" of pain must be considered; and that there must be medical findings based on acceptable diagnostic techniques that show the existence of an impairment that could reasonably be expected to produce the pain and that, when considered with all evidence in the record, would lead to a conclusion that the individual is disabled.[3] Petitioner's case, which arose under prior law, therefore does not present a legal issue that warrants review by this Court.[4]

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[3]Section 3(a)(1) of the 1984 Act adds the following text to Section 223(d)(5) of the Social Security Act, 42 U.S.C. 423(d)(5):

> An individual's statement as to pain or other symptoms shall not alone be conclusive evidence of disability as defined in this section; there must be medical signs and findings, established by medically acceptable clinical or laboratory diagnostic techniques, which show the existence of a medical impairment that results from anatomical, physiological, or psychological abnormalities which could reasonably be expected to produce the pain or other symptoms alleged and which, when considered with all evidence required to be furnished under this paragraph (including statements of the individual or his physician as to the intensity and persistence of such pain or other symptoms which may reasonably be accepted as consistent with the medical signs and findings), would lead to a conclusion that the individual is under a disability. Objective medical evidence of pain or other symptoms established by medically acceptable clinical or laboratory techniques (for example, deteriorating nerve or muscle tissue) must be considered in reaching a conclusion as to whether the individual is under a disability.

[4]The special statutory remand provisions in Section 2(d) of the 1984 Act, which were at issue in *Heckler* v. *Kuehner*, No. 83-1593 (Nov. 5, 1984), apply only to cases relating to the "medical improvement" issue,

b. Petitioner next contends (Pet. 8-12) that the ALJ erred in his assessment of the evidence. Specifically, petitioner maintains (Pet. 9-12) that his testimony regarding pain was discredited by the ALJ solely on the basis of petitioner's appearance at the hearing, rather than on the basis of all the evidence in the record, and that the ALJ disregarded objective medical evidence. This assertion is incorrect. The ALJ explicitly stated that his finding that petitioner's allegation of severe and constant pain was "less than credible" was "[b]ased on the hearing appearance *and the objective medical evidence of record*" (ALJ Decision 9 (emphasis added); Pet. App. 20), not on petitioner's appearance at the hearing alone.[5] Furthermore, the ALJ specifically noted that several medical reports indicated that the compression fracture of petitioner's lumbosacral spine ten years earlier was well healed (ALJ Decision 7).

c. Finally, petitioner contends (Pet. 13-14) that the Secretary did not attach appropriate weight to the opinions of his treating physicians. Quoting the Second Circuit's decision in *Rivera* v. *Schweiker*, 717 F.2d 719, 723 (1983), petitioner argues (Pet. 14) that the treating physician's conclusion is "binding" absent substantial evidence to the contrary. Even assuming that petitioner were correct about the binding effect of a treating physician's testimony, such a

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which arises only in connection with the review of the disability of persons who previously had been found to be disabled. Those provisions have no application here, because petitioner is a new applicant for disability benefits, not a recipient of benefits whose continuing eligibility was reviewed by the Secretary. There accordingly is no basis for a remand in light of the new Act.

[5]The decision in this case therefore is fully consistent with the Second Circuit's holding in *Rivera* v. *Schweiker*, 717 F.2d 719 (1983), relied upon by petitioner (Pet. 11-12), that the ALJ's credibility determination "should be arrived at in light of *all* the evidence regarding the extent of pain" (717 F.2d at 724).

rule would not aid him here. The ALJ explained that two of the four medical reports in the record, including one from a treating physician (Dr. Farah), concluded that petitioner was capable of performing sedentary work (ALJ Decision 5-7, 8). Moreover, the other treating physician, Dr. Groves, also had initially concluded that petitioner was capable of performing medium substantial gainful activity, although he concluded in a subsequent report that petitioner was unable to work (*id.* at 6, 8). The ALJ explained that he was discounting the latter report because there was no new evidence to support the physician's changed view (*id.* at 8).

In any event, Section 9(b)(1) of the Social Security Disability Benefits Reform Act of 1984 now specifically addresses the question of the treating physician's opinion. The new provision clearly does not require the Secretary to give controlling weight to the treating physician's opinion.[6] Petitioner's assertion regarding the impact of such evidence under prior law therefore is inconsistent with Congress's judgment and raises no issue of continuing importance warranting this Court's consideration.

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[6]Section 9(b)(1) adds a new paragraph (B) to Section 223(d)(5) of the Social Security Act, 42 U.S.C. 423(d)(5). The new paragraph (B) provides that the Secretary shall consider all evidence available in the individual's case record and "shall make every reasonable effort" to obtain "all medical evidence" from the treating physician "prior to evaluating medical evidence obtained from any other source on a consultative basis." Although the new Act therefore requires the Secretary to make efforts to procure evidence from the treating physician, it does not require that such evidence be given a presumptively binding effect. To the contrary, the new provision for procuring such evidence was drawn from the Senate bill (130 Cong. Rec. H9830 (daily ed. Sept. 19, 1984)), and the Senate Report states that, by adding this requirement, "[t]he Committee does not intend to alter in any way the relative weight which the Secretary places on reports received from treating physicians and from consultative examinations." S. Rep. 98-466, 98th Cong., 2d Sess. 26 (1984).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1984

DOJ-1984-11